

## § 23.89

SOURCE: 45 FR 21184, Mar. 31, 1980, unless otherwise noted.

### Subparts A–E [Reserved]

### Subpart F—Implementation of Section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as Amended

SOURCE: Amdt. 1, 57 FR 18410, Apr. 30, 1992, unless otherwise noted.

#### § 23.89 Definitions.

*Affiliation* has the same meaning the term has in regulations of the Small Business Administration, 13 CFR part 121. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly

(a) One concern controls or has the power to control the other, or

(b) A third party or parties controls or has the power to control both, or

(c) An “identity of interest” between or among parties exists such that affiliation may be found.

In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships.

*Concession* means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight-carrying capacities; fixed base operators, flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

(a) Appendix A to this subpart contains a listing of the types of businesses that are frequently operated as concessions.

(b) Examples of entities that do not meet the definition of a concession in-

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clude suppliers, flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, individual taxis with permits, telephone and electric utilities, skycap services under contract with an air carrier, and management contracts.

(c) Concessions may be operated under the following types of agreements:

(1) Leases.

(2) Subleases.

(3) Permits.

(4) Contracts.

(5) Other instruments or arrangements.

*Concessionaire* means one who operates a concession.

*Disadvantaged business* shall have the same meaning as set forth in 49 CFR part 26, except it shall be a small business concern, as defined in this subpart, not as defined in 49 CFR part 26.

*Material amendment* means a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope, of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

*Primary airport* means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

*Small business concern* means a firm, including all its domestic and foreign affiliates, that qualifies under the applicable size standard set forth in appendix A to this subpart. In making a size determination, all affiliates, regardless of whether organized for profit, must be included. A firm qualifying under this definition that exceeds the size standard after entering a concession agreement, but that otherwise remains eligible, may continue to be counted as DBE participation until the current agreement, including the exercise of options, expires.

(a) The Secretary may periodically adjust the size standards in appendix A to this subpart for inflation.

(b) A firm that was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to the effective date of this subpart, pursuant to a requirement in § 23.43(d) in effect prior to March 4, 1999 (See 49 CFR Parts 1 to 99 revised as of October 1, 1998.) or FAA guidance implementing section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as amended, that has exceeded the size standard, may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

*Socially and economically disadvantaged individuals* shall have the same meaning as set forth in 49 CFR part 26.

*Sponsor* means the recipient of an FAA grant.

[Amdt. 1, 57 FR 18410, Apr. 30, 1992, as amended at 64 FR 5126, Feb. 2, 1999]

#### § 23.91 Applicability.

This subpart applies to any sponsor that has received a grant for airport development authorized by the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987.

#### § 23.93 Requirements for airport sponsors.

(a) *General requirements.* (1) Each sponsor shall abide by the non-discrimination requirements of § 26.7 with respect to the award and performance of any concession agreement covered by this subpart.

(2) Each sponsor shall take all necessary and reasonable steps to foster participation by DBE's in its airport concession activities.

(3) The following statements shall be included in all concession agreements executed between the sponsor and any firm after the effective date of this subpart.

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23, subpart F. The concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agree-

ment covered by 49 CFR part 23, subpart F.

(ii) "The concessionaire agrees to include the above statements in any subsequent concession agreements that it enters and cause those businesses to similarly include the statements in further agreements."

(b) *Additional requirements for primary airports.* (1) Sponsors of primary airports shall implement a disadvantaged business enterprise (DBE) concession plan containing the elements listed in § 23.95. Sponsors of more than one primary airport shall implement a separate plan for each location that has received assistance for airport development. The plan shall be submitted to the appropriate FAA Regional Office for approval.

(2) The sponsor shall review and update the plan at least annually. The updated plan shall include any information required under § 23.95 that was not available to the sponsor when the previous submission was made. Updated plans shall be submitted to the appropriate FAA Regional Office for approval.

(c) *Additional requirements for nonprimary airports.* Sponsors of commercial service airports (except primary), general aviation and reliever airports are not required to implement a DBE concession plan but shall take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever there is a concession opportunity.

[Amdt. 1, 57 FR 18410, Apr. 30, 1992, as amended at 64 FR 5126, Feb. 2, 1999]

#### § 23.95 Elements of Disadvantaged Business Enterprise (DBE) concession plan.

(a) *Overall annual DBE goals.* (1) The sponsor shall establish an overall goal for the participation of DBE's in concessions for each 12-month period covered by the plan. The goals shall be consistent with the process for setting overall goals set forth in 49 CFR 26.45.

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period. (Where the terms of a concession